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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1929~~ 1930

No. ~~556~~ 24

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

BENJAMIN HARRELSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 3, 1930
CERTIORARI GRANTED FEBRUARY 24, 1930

SUPREME COURT OF THE UNITED STATES

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A [Caption omitted.]

1 [Citation in usual form showing service on Massey Holmes et al., filed Dec. 15, 1928, omitted in printing.]

2 [Caption omitted.]

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BENJAMIN HARRELSON, MALETA H. SCOTT, LENA HARRELSON, FRANK Harrelson, Sarah Harrelson, Annie H. Green, Helen Harrelson, Howard M. Harrelson, Alma H. Allison, and Martin Harrelson, plaintiffs

vs.

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH United States Collection District of Missouri, defendant

In United States District Court, Western Missouri

Petition

Filed Aug. 20, 1927

Benjamin Harrelson, Maleta H. Scott, Lena Harrelson, Frank Harrelson, Sarah Harrelson, Annie H. Green, Helen Harrelson Howard M. Harrelson, Alma H. Allison, and Martin Harrelson, as sole beneficiaries and distributees under the will of William H. Harrelson, deceased, plaintiffs, respectfully show to the court:

1. That William H. Harrelson, of Kansas City, Missouri, died testate on March 8, 1920; that plaintiffs were the sole beneficiaries named in said will and the sole distributees of the estate of the said William H. Harrelson, deceased; that William S. Flournoy, John P. Flournoy, and Henry Knepp were the duly appointed and qualified executors under said will, and letters testamentary were duly issued to them; that they thereafter proceeded with the administration of said estate; that on or about the 5th day of March, 1925, said administration was finally closed; said executors were finally discharged and the property and assets of said estate were duly and lawfully distributed among the plaintiffs as the sole beneficiaries and distributees thereof, and plaintiffs duly accepted their respective portions of said estate under said distribution and are now the lawful owners thereof and entitled to collect any and all claims on behalf of said estate which were not collected at the date of the closing of the administration thereof.

That defendant is the collector of internal revenue for the said sixth United States collection district of Missouri.

3 2. That said executors, acting under the provisions of the revenue act of 1918, approved February 24, 1919, filed within due time with the collector of internal revenue for the sixth United States collection district of Missouri a return for the purposes of the

Federal estate tax showing a total net estate of real and personal property of $2,137,204.

3. That the Commissioner of Internal Revenue, acting for the United States upon a final audit and review of said estate-tax return, determined that the total net valuation of said decedent's estate for estate-tax purposes was $2,279,068.28, of which amount the real estate owned by said decedent at the time of his death and situated in the State of Missouri was valued at $269,730.00.

4. Said executors paid to defendant, collector of internal revenue for the sixth United States collection district of Missouri, the sum of $200,569.58, representing the Federal estate tax on the transfer of said estate as finally determined by the said Commissioner of Internal Revenue, together with interest in the sum of $6,569.43, said payments of tax and interest having been made at various times, to wit, on or about February 21, March 4, March 8, September 9, and October 25, 1921, and March 23, March 24, and July 24, 1922.

5. On January 31, 1925, said executors, acting through William S. Flournoy, filed with the defendant as collector aforesaid a claim for refund of $37,762.20, Federal estate tax, said claim being based upon the contention by said executors that the value of the real estate situated in Missouri and owned by the decedent at the time of his death was not, under the provisions of the revenue act of 1918, properly subject to the Federal estate tax and that the tax paid on the value thereof by said executors was illegally assessed and collected and should be refunded to plaintiffs.

6. That subsequently, on August 20, 1925, the said Commissioner of Internal Revenue rejected said claim for refund in its entirety.

7. That at the time of his death said decedent owned real estate situated in the State of Missouri having an aggregate value of $269,730.00, which value was erroneously and illegally included by the Commissioner of Internal Revenue in arriving at the value of the gross estate of said decedent and in arriving at the amount of the Federal estate tax due from said estate under the revenue act of 1918, approved February 24, 1919.

4 8. That the action of the Commissioner of Internal Revenue in including in the value of the gross estate of the decedent the value of the real estate situated in the State of Missouri and owned by the decedent at the time of his death, to wit, $269,730.00, and in assessing and collecting the Federal estate tax on such basis was erroneous and illegal in this, to wit:

That section 402 of the revenue act of 1918, approved February 24, 1919, provided that the value of the gross estate of the decedent should be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—(a) to the extent of the interest therein of the decedent at the time of his death which after his death was subject (1) to the payment of the charges against his estate and (2) to the payment of

the expenses of administration of his estate and (3) to distribution as part of his estate.

That under the laws of the State of Missouri, under which the estate of said decedent was administered, the real estate situated in the State of Missouri and owned by the decedent at the time of his death was not subject to the payment of the expenses of administration of said estate, and for this reason the value of said real estate should not, and could not lawfully, have been included in the value of the gross estate of the decedent for the purpose of calculating the amount of the Federal estate tax due from said estate.

9. That in arriving at the amount of Federal estate tax due from said estate said Commissioner of Internal Revenue erroneously and illegally and without authority of law calculated said tax upon an alleged taxable estate of $2,279,068.28, including the value of said real estate situated in Missouri, resulting in the assessment and collection of a tax in the sum of $200,569.58, plus interest in the sum of $6,569.43, whereas said tax should have been calculated in accordance with law and the terms of said revenue act of 1918 upon a taxable net estate of $2,009,338.28, excluding the value of said Missouri real estate, which would have resulted in the assessment and collection of a tax in the sum of $162,807.38, and thereupon the estate to which plaintiffs were entitled under the will of the said William H. Harrelson was reduced by the sum of $37,762.20.

10. Plaintiffs are justly entitled to recover from the defendant herein, after allowing all just credits and set-offs, the sum of $37,762.20, together with interest on said sum at the rate of 6% per annum from July 24, 1922, and plaintiffs demand judgment against said defendant in said amount, principal and interest.

Benjamin Harrelson, Maleta H. Scott, Lena Harrelson, Frank Harrelson, Sarah Harrelson, Annie H. Green, Helen Harrelson, Howard M. Harrelson, Alma H. Allison, Martin Harrelson (by Massey Holmes, F. S. Bright, & L. C. Connally, their attorneys), distributees under the will of William H. Harrelson, decd.

MASSEY HOLMES,
FRANK S. BRIGHT,
L. C. CONNALLY,
Attorneys for Plaintiffs.

[*Duly sworn to by Benjamin Harrelson; jurat omitted in printing.*]

[File endorsement omitted.]

[Writ of summons with marshal's return, filed Sept. 9, 1927, omitted in printing.]

6 In United States District Court

Record entry demurrer

Filed Sept. 20, 1927

This day comes defendant, by his attorney, and files demurrer herein.

7 In United States District Court

Demurrer

Filed Sept. 20, 1927

Comes now the defendant, by its attorney, Roscoe C. Patterson, United States attorney for the Western District of Missouri, and demurs to the plaintiffs' petition herein for the reason that said petition wholly fails to state facts sufficient to constitute a cause of action.

ROSCOE C. PATTERSON,
United States Attorney,
By HARRY L. THOMAS,
Assistant.

[File endorsement omitted.]

In United States District Court

Record entry, demurrer submitted and taken under advisement

Sept. 26, 1927

This day come the parties, by counsel, and defendant's demurrer is heard by the court and taken under advisement.

In United States District Court

Record entry, demurrer overruled

Sept. 13, 1928

This day there is filed herein by Judge Merrill E. Otis memorandum opinion overruling the demurrer of the defendant herein.

In United States District Court

Judgment

Filed Dec. 14, 1928

Now on this 14th day of December, 1928, this cause having heretofore come on to be heard upon the demurrer of defendant to the

petition of plaintiff and having been submitted to the court upon argument and briefs of counsel, the court, upon consideration thereof, and being fully advised in the premises, is of the opinion and does hereby order that said demurrer be, and the same hereby is, overruled.

And thereupon said defendant, not asking to plead further but declining to plead further within the time allowed by the court, it is considered, ordered, adjudged, and decreed by the court that the said plaintiffs, Benjamin Harrelson, Maleta H. Scott, Lena Harrelson, Frank Harrelson, Sarah Harrelson, Annie H. Green, Helen Harrelson, Howard M. Harrelson, Alma H. Allison, and Martin Harrelson, have judgment against and recover from the said defendant, Noah Crooks, collector of internal revenue for the sixth United States collection district of Missouri, the said sum of $37,-
762.20, the amount claimed in the petition, with interest
8 thereon at 6% per annum from July 24, 1922, computed according to the provisions of the revenue act approved May 29, 1928, and costs, and that plaintiffs have execution therefore against defendant.

MERRILL E. OTIS, *Judge.*

Approved this 14th day of December, 1928.

FRANK S. BRIGHT,
LOWNDES C. CONNALLY,
MASSEY HOLMES,
Attorneys for Plaintiffs.
ROSCOE C. PATTERSON, *U. S. Atty.*,
HARRY L. THOMAS, *Asst. U. S. Atty.*,
Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

Record entry, application for appeal, etc.

Filed, Dec. 15, 1928

This day comes defendant, by his attorney, and files application for an appeal and assignment of errors.

In United States District Court

Application for appeal

Filed Dec. 15, 1928

To the Hon. MERRILL E. OTIS, *District Judge:*

The above-named defendant, Noah Crooks, collector of internal revenue for the sixth United States collection district of Missouri, feeling grieved by the judgment rendered and entered in the above-

entitled cause on the 14th day of December, 1928, does hereby appeal from said judgment to the Circuit Court of Appeals for the Eighth Circuit, for the reasons set forth in the assignment of errors filed herewith, and prays that the appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit under the rules of such court in such cases made and provided.

NOAH CROOKS,
By ROSCOE C. PATTERSON,
United States Attorney,
By HARRY L. THOMAS,
Assistant U. S. Attorney,
Attorneys for Defendant.

[File endorsement omitted.]

9 In United States District Court

Assignments of error

Filed December 15, 1928

And now comes the above-named defendant, the appellant herein, by his attorney of record, and assigns, as errors upon which he will rely, the following errors as having intervened in the record, proceedings, and judgment of the United States District Court in the above-entitled cause, to wit:

1. The court erred in overruling defendant's demurrer to plaintiff's petition.

2. The court erred in rendering judgment for plaintiffs and against the defendant.

Wherefore appellant prays that the judgment entered in said cause in the said District Court may be reversed and said cause remanded.

ROSCOE C. PATTERSON,
United States Attorney,
By HARRY L. THOMAS, *Assistant.*

[File endorsement omitted.]

In United States District Court

Order allowing appeal

Filed December 15, 1928

Upon petition of defendant herein it is ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, from the judgment heretofore filed and entered in this cause on

the 14th day of December, 1928, be, and the same is hereby, allowed, and that a certified transcript of the record, in accordance with the rules of practice of the courts of the United States, be transferred to the said United States Circuit Court of Appeals.

MERRILL E. OTIS, *Judge.*

[File endorsement omitted.]

In United States District Court

Record entry, præcipe for transcript

Filed December 17, 1928

This day comes defendant, by attorney, and files præcipe for transcript of record herein.

In United States District Court

Præcipe for transcript

Filed December 17, 1928

Please furnish the United States attorney, on behalf of the defendant herein, transcript of the following pleadings and records, upon proper certificate:

1. Petition and summons.
2. Demurrer.
3. Memorandum opinion overruling demurrer.
4. Judgment.
5. Application for appeal.
6. Assignment of errors.
7. Order allowing appeal.
8. All record entries.
9. Præcipe for transcript.

ROSCOE C. PATTERSON,
United States Attorney,
By HARRY L. THOMAS,
Assistant United States Attorney.

[File endorsement omitted.]

In United States District Court

Memorandum opinion on demurrer

Filed September 13, 1928

Plaintiffs sue to recover from the defendant the sum of $37,762.20, with interest, alleged to have been unlawfully collected as a tax out of an estate inherited by them. The total value of the estate is alleged in the petition to have been $2,137,204.22, which included both real

and personal property. The value of the real estate included was $269,730.00 and the amount involved in this suit was that part of the tax collected which was based upon the value of the real estate. Defendant has demurred to the petition on the ground that it states no cause of action.

The statute which fixes the basis for the assessment of the estate tax, being the revenue act of 1918 (40 Stat. 1057–1097) is:

"SECTION 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and to distribution as part of his estate; * * *."

11 It will be noted that property may not be included in the value of the gross estate of a decedent unless after his death three facts exist with reference to it. Of these one is that the property is subject to the expenses of the administration of the estate. If all three facts are not present, including this one, then the property may not be included in calculating the value of the estate to be taxed. (United States vs. Field, 255 U. S. 257, 262.)

The theory of the case is that real estate in Missouri is not subject to expenses of administration and that therefore the real estate here should not have been included in determining the amount of tax due.

The defendant disputes this theory.

The only question for consideration then is whether in Missouri real estate is subject to expenses of administration and that question is to be determined by the State law.

The question must be resolved in plaintiffs' favor. Repeated decisions of Missouri appellate courts announce the law of this State to be that real estate is not subject to administration expenses. Among other cases are the following: In re Motier Estate (7 Mo. App. 514), Ritchey vs. Withers (72 Mo. 556), Elstroth vs. Young (94 Mo. App. 351), State vs. Doud (269 S. W. l. c. 924). I have found no decision by a Missouri court, with one exception, which holds to the contrary. The exception is Elstroth vs. Young (88 Mo. App. 418), decided by the St. Louis Court of Appeals April 9, 1901. But that decision, to the extent that it announced a doctrine contrary to the one generally stated, was repudiated by the same court in a later consideration of the same case (Elstroth vs. Young, 94 Mo. App. 351).

The defendant cites Howell vs. Jump (140 Mo. 441).

In the Howell case, under an order directing the sale of real property to pay debts of the estate in accordance with what is now section 141, Revised Statutes of Missouri, 1919, real estate was sold and a portion of the proceeds was applied to the payment of administration expenses. The validity of the sale was upheld because the order upon which the sale had been made was a lawful order. It

was held that the fact that a part of the proceeds was improperly diverted to the payment of administration expenses did not invalidate the sale. The language of the court was as follows:

"The fact that the land only sold at the administrator's sale for enough to pay the costs of the administration does not
12 defeat this sale. It is true a sale of land by an administrator can only be made for the payment of the debts of deceased. A sale made merely for the purpose of paying the costs of administration has been held to be invalid. (Farrar vs. Dean, 24 Mo. 16.) But in this sale there were debts remaining unpaid and the sale was made for the purpose of paying them. The court therefore had jurisdiction to order the sale and the purchaser was not bound to bid an amount which would pay the debts or to see that the money paid was properly applied. (Emphasis mine.)"

Clearly this case not only does not conflict with but supports plaintiffs' theory.

Defendant cites the case of Steedman vs. United States, a decision by the Court of Claims involving the same question as that involved here. I have read the opinion in that case carefully. I think it is not well reasoned and that its conclusion is erroneous.

The demurrer is overruled.

MERRILL E. OTIS,
District Judge.

[File endorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

13 [Appearances of counsel omitted in printing.]

14 [Minute entry of argument and submission June 4, 1929, omitted in printing.]

15 In United States Circuit Court of Appeals, Eighth Circuit

No. 8533, May term, A. D. 1929

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE, appellant vs. BENJAMIN HARRELSON ET AL., APPELLEES	Appeal from the District Court of the United States for the Western District of Missouri.

Mr. William T. Sabine, jr., special attorney, Bureau of Internal Revenue (Mr. William L. Vandeventer, United States attorney, Mr. Harry L. Thomas, assistant United States attorney, and Mr. C. M. Charest, General Counsel, Bureau of Internal Revenue, were with him on the brief), for appellant.

Mr. S. L. Swarts and Mr. F. S. Bright (Mr. Massey Holmes and Mr. L. C. Connally were with them on the brief) for appellees.

Before STONE, BOOTH, and GARDNER, Circuit Judges

Opinion

Filed Oct. 1, 1929

BOOTH, Circuit Judge, delivered the opinion of the court.

This was an action brought by the appellees, beneficiaries under the will of William H. Harrelson, deceased, against Noah Crooks, appellant, as collector of internal revenue for the sixth United States collection district of Missouri. The action was to recover a refund of $37,762.20 of Federal estate taxes which had been paid by the executors of the estate.

16 The complaint alleged that William H. Harrelson of Kansas City, Missouri, died testate March 8, 1920; that the executors under his will in due time, acting under the provisions of the revenue act of 1918, filed with the collector of internal revenue a return for the purposes of the Federal estate tax; that the Commissioner of Internal Revenue upon a final audit and review determined that the total net valuation of decedent's estate for Federal estate-tax purposes was $2,279,068.28, of which amount the value of the real estate owned by decedent at the time of his death was $269,730; that the amount of the tax as fixed by the Commissioner of Internal Revenue was paid by the executors, and a claim for refund of $37,762.20 was filed, based upon the contention that the value of the real estate situated in Missouri and owned by the decedent at the time of his death was not, under the provisions of the revenue act of 1918, subject to the Federal estate tax, and that the amount of the tax ($37,762.20) paid on the value of said real estate was illegally assessed and collected and should be refunded.

The complaint further alleged:

"That under the laws of the State of Missouri under which the estate of said decedent was administered the real estate situated in the State of Missouri was owned by the decedent at the time of his death was not subject to the payment of the expenses of administration of said estate, and, for this reason the value of said real estate should not, and could not lawfully, have been included in the value of the gross estate of the decedent for the purpose of calculating the amount of the Federal estate tax due from said estate."

The defendant demurred to the complaint. The court overruled the demurrer, and the defendant refusing to plead further, judgment was entered for the plaintiffs in the amount asked.

The question involved in this appeal is whether under the provisions of section 402 (a) of the revenue act of 1918 the value of real estate situated in the State of Missouri should be included in the value of the gross estate of the decedent Harrelson, who died the owner thereof.

Section 402 (a) of the revenue act of 1918 reads as follows:

"SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death
17 of all property, real or personal, tangible or intangible, wherever situated—

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate."

There are two main contentions made by the appellant: (1) That section 402 (a) has no application to real estate, but applies only to personal property; (2) even if the statute has application to real estate, yet that real estate in Missouri is subject to the payment of the expenses of administration.

The argument that section 402 (a) relates solely to personal property is based upon the use of certain phrases and words used in the section. It is contended that the phrases "subject to the payment of the charges against his estate," "the expenses of its administration," and "subject to distribution as part of his estate" were all anciently used in connection with personalty only; that Congress knew this and accordingly used the phrases with their ancient technical meaning and as relating solely to personal property.

We do not acquiesce in the contention thus made for several reasons. It was doubtless the intention of Congress to include both real estate and personal property within the provisions of section 402 considered as a whole. The entire section constitutes a single sentence. The opening words of the section, "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated," include no definite amount of any kind of property. It is only by reading the opening words in connection with one or more of the clauses (a) to (f) that any definite amounts of any kind of property can be arrived at. Clauses (a) to (f) are what their language states them to be—extent clauses and not exception clauses. If, therefore, clause (a) should be construed as relating to personal property only, a large amount of real property would not be included within the purview of section 402 at all, for the opening words of that section, read in connection with clauses (b) to (f),
18 would fail to cover many interests in real property. Furthermore, the argument of appellant, based upon the ancient technical meaning of the words used in section 402 (a) goes too far and defeats itself. The word "distribution" as applied to estates meant at common law the division of estates of intestates only. It was not properly applied to testate estates. (18 C. J. 803; Roger v. Gillett, 9 N. W. 204 (Iowa).) If, therefore, the ancient technical meaning is applied in section 402 (a), personal property of intestate estates only would be covered,

while personal property passing by will would not be included. Such a result plainly could not have been intended by Congress.

Our conclusion on this branch of the case is that the language of section 402 (a) is not to be given any ancient technical meaning, but is to be read giving to the words their ordinary, popular meaning, and that when so read both real and personal property are included.

With such meaning given to the words used the construction of section 402 (a) is, in our opinion, perfectly plain. The value of such real estate of the decedent as fulfills the conditions of clause (a), and such only, is to be included in the value of the gross estate. The conditions attaching to such real estate are that the decedent at the time of his death had an interest therein, that the real estate after the death of decedent is subject to the payment of the charges against this estate, that the real estate is subject to the expenses of the administration of the estate, that the real estate is subject to distribution as part of the estate of decedent. In our opinion it makes very little practical difference whether these conditions are considered as four separate independent conditions or three separate conditions, treating the second and the third as a single but combined condition. The latter method seems to have been adopted as a matter of convenience in the case of United States v. Field (255 U. S. 257). There was no intimation, however, in thus combining two of the conditions that both were not equally important. Nor was there any intimation that the word "and" before the words "the expenses of its administration" in section 402 (a) should be construed as meaning "or," which is what the appellant in effect contends for. What the Field case did hold was that all of the conditions must be met before the property could be in-
19 cluded as part of the gross estate, that the particular property there in question was not "subject to distribution as part of the testator's estate," and therefore was not thus included.

It may also be noted that the regulations relating to the estate tax which were promulgated by the Commissioner of Internal Revenue after the decision in the Field case expressly recognize that real estate in order to be included in the gross estate must fulfill the condition that such real estate is "subject to * * * the payment of the expenses of * * * administration." This condition is recognized as an independent one. (See Regulations 63, article 11, approved by the Secretary of the Treasury July 27, 1922, under the revenue act of 1921; Regulations 68, article 10, approved by the Secretary of the Treasury March 26, 1925, under the revenue act of 1924.) The revenue act of 1926 cut out all of the conditions contained in section 402 (a) of the revenue act of 1918, except the first—"(a) to the extent of the interest therein of the decedent at the time of his death"; so that under the present law the question here involved can no longer arise.

It is also a contention of counsel for appellant that the expression "charges against his estate" in section 402 (a) includes "expenses

administration." To hold thus would be to wipe out a plain distinction made by the statute itself, and which has existed in many jurisdictions; to hold thus would also violate one of the primary canons of statutory construction—that each clause and each word of a statute should, if reasonably possible, be given meaning and effect. We think this contention of counsel should not be sustained.

As to the second main contention—that in the State of Missouri real estate is subject to the payment of the expenses of administration of the estate—the question involved is purely one of local law. (Clarke v. Clarke, 178 U. S. 186; Olmsted v. Olmsted, 216 U. S. 386; Wardell v. Blum, 276 F. 226; In re Barnett, 12 F. (2d) 73.)

At common law real estate of a decedent was not subject to the payment of his simple contract debts, nor to the payment of legacies, nor to the payment of the expenses of administering the estate. (24 C. J. 459; United States v. Drennen, 25 Fed. Cas. #14,992; Titterington v. Hooker, 58 Mo. 593; McQuitty v. Wilhite, 218 Mo. 586, 592.

20 Most of the States have by statute changed the common-law rule as relating to debts and have made the real estate subject to the payment of debts in case the personal property is insufficient for that purpose. Some of the States have by statute made the real estate subject also to the payment of the expenses of administration of the estate. Missouri has by statute modified the common-law rule so far as concerns debts and legacies. Section 141, Revised Statutes of Missouri, 1919, reads as follows:

"SEC. 141. SALE OF LANDS TO PAY DEBTS.—If any person die and his personal estate shall be insufficient to pay his debts and legacies, his executor or administrator shall present a petition to the proper court, stating the facts; and praying for the sale of the real estate, or so much thereof as will pay the debts and legacies of such deceased person."

In Missouri the common law is in force and effect except in so far as it has been modified by statute. (R. S. Mo. 1919, sec. 7048; Lindell v. McNair, 4 Mo. 380; Reaume v. Chambers, 22 Mo. 36; Baker v. Crandall, 78 Mo. 584.)

The common-law rule that real estate of a decedent is not subject to the payment of administration expenses is, we think, clearly recognized in Missouri.

In Farrar v. Dean (24 Mo. 16, 18) the court said:

"The administrator has no power over the real estate, except so far as to hold it for the payment of the debts of the deceased, and when there are no debts the land descends to the heirs or escheats to the State, and it is not in the power of the administrator to hinder this legally, nor can the probate court direct or order a sale of real estate for costs accrued after the administration begins, and only because it did begin. Such costs are not debts due by the deceased, nor debts at the time of the death of the intestate."

In Presbyterian Church, etc., v. McElhinney (61 Mo. 540, 542-3), the court said:

"Under our statute respecting administration and the repeated adjudication of this court thereon probate courts possess no power to allow any claims against a decedent's estate or to order the
21 sale of land belonging thereto, except for the payment of the debts of the deceased, i e., those in existence at the date of his death."

In the case In re Motier's Estate (7 Mo. App. 514, 517) the court said:

"The land belongs to the heirs. It can not be touched for any of the purposes of the administration, except in the specific mode and for the specific objects elsewhere indicated by statute. When real estate is converted into money, whatever surplus remains after a proper application of the objects of the conversion still represents the realty for the benefit of the heirs, and can not be merged in the personalty for purposes which pertain only to that classification."

In Ritchey v. Withers (72 Mo. 556), a case in which land was sold by the administrator for the payment of debts, but part of the proceeds was used for the payment of improvements and repairs and for additional allowance to the widow, the court said (p. 559):

"The County Court had no power to order the sale of real estate except for the payment of debts, and when it was sold for that purpose the proceeds arising from the sale could not be diverted from it and applied to another and different purpose. The County Court could not have ordered a sale of the land for the purpose of paying the administrators for expenses incurred in making improvements thereon, nor for the purpose of raising money to appropriate to the widow for her support for twelve months, and it was equally powerless to appropriate to either of said purposes any part of the proceeds derived from a sale of land made to raise money to pay debts."

In State v. Doud (269 S. W. 923, 924 (Mo. App.)) the court said:

"If the real estate is sold by order of the probate court for the payment of the debts of the decedent, any surplus of the proceeds of the sale remaining after payment of the debts goes to the heir or devisee, and if the heir or devisee has conveyed the real estate the surplus belongs to her grantee. In other words, when real esate is converted into money for the payment of the debts of the decedent, the surplus of the proceeds of the sale remaining, after payment of the debts, retains the character of real estate for the purpose
22 of succession or distribution, and goes to the person in whom the title to the real estate was vested when it was converted."

(See also Teverbaugh v. Hawkins (82 Mo. 180), Garnett v. Carson (11 Mo. App. 290), In re Estate of Lloyd (44 Mo. App. 670).)

The cases of Elstroth v. Dickmeyer (88 Mo. App. 418) and Elstroth v. Young (94 Mo. App. 351) when rightly understood are in harmony with the foregoing cases. In the Elstroth cases the expenses which were allowed to be paid out of the proceeds of land sold by order of court were the expenses and commissions incurred

in or as incidental to the sale of the lands and were not the ordinary expenses of administration. The distinction is recognized by the court in the following language in Elstroth v. Young (pp. 355–356):

"The proceeds of the sale of lands made by an order of the probate court in pursuance of the provisions of Chapter I, Article 8, Revised Statutes, 1899, can not be used for the purpose of making good deficiencies in the expenses of administration."

In Howell v. Jump (140 Mo. 441) land was ordered sold to pay debts. The proceeds were applied by the administrator to the payment of the costs of administration and of the sale. The court recognized the rule in Farrar v. Dean, supra, but held that the sale would not be set aside because of the misapplication of the proceeds.

From the foregoing review of the Missouri authorities, we think, it is clear that real estate of a decedent in that State can not be sold for the payment of expenses of administration, nor can the proceeds of land sold to pay debts be lawfully used to pay expenses of administration. We think it follows that such real estate is "not subject" to the payment of expenses of administration within the meaning of section 402 (a). We hold therefore that the value of the real estate in question should not have been included in the value of the gross estate of the decedent.

The recent cases in this court of United States v. Waite (33 F. (2d) 567), United States v. Dietz (33 F. (2d) 576), Allen v. Henggeler (32 F. (2d) 69) have been called to our attention.

In the Waite case the question involved was whether the value of the share which a widow may elect to take in lieu of the provision of a will under the Missouri statute should be included in
23 determining the value of the gross estate of the decedent under section 402 of the revenue act of 1918. The court proceeded on the assumption that both real and personal property were involved. It held that the value of the real estate should be included in determining the value of the gross estate, not because the real estate fulfilled the conditions of section 402 (a), but because it fulfilled the condition of section 402 (b). The value of the personal property was included because the personal property fulfilled the condition of section 402 (a).

In neither the Dietz case nor the Henggeler case was the question which is involved in the case at bar discussed or determined.

The case of Steedman v. United States (63 Ct. Cls. 226) involved a question identical with that in the case at bar, and a conclusion was reached by that court opposite to the one which we have above indicated. We have the utmost respect and deference for the opinions of that court. We have therefore given careful thought and consideration to the opinion in the Steedman case, and we regret that we are unable to acquiesce in the conclusion therein reached.

Whatever may be our views as to the wisdom of the condition in question, contained in section 402 (a), yet that condition was part of the law at the time of decedent's death. The executors of his will and the beneficiaries thereunder had the unquestionable right to in-

sist that the condition should be given effect in computing the value of the gross estate of decedent. It is our duty to construe the statute as we find it. In United States v. Merriam (263 U. S. 179, 187–8) the court in its opinion used the following language which, we think, is apposite here:

"On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. (Gould v. Gould, 245 U. S. 151, 153.) The rule is stated by Lord Cairns in Partington v. Attorney General (L. R. 4 H. L. 100, 122):

24 "'I am not at all sure that in a case of this kind, a fiscal case, form is not amply sufficient, because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, can not bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.' And see Eidman v. Martinez (184 U. S. 578, 583)."

For the reasons above outlined we think that the judgment of the court below was right. It is therefore affirmed.

25 In United States Circuit Court of Appeals, Eighth Circuit.

No. 8533

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE, APPELLANT

vs.

BENJAMIN HARRELSON, MALETA H. SCOTT, LENA HARRELSON, FRANK Harrelson, Sarah Harrelson, Annie H. Green, Helen Harrelson, Howard M. Harrelson, Alma H. Allison, and Martin Harrelson

Appeal from the District Court of the United States for the Western District of Missouri

Judgment

October 3, 1929

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed with costs, and that Benjamin Harrelson, Maleta H. Scott, Lena Harrelson, Frank Harrelson, Sarah Harrelson, Annie H. Green, Helen Harrelson, Howard M. Harrelson, Alma H. Allison, and Martin Harrelson have and recover against Noah Crooks, collector of internal revenue, the sum of dollars for their costs herein.

26 In United States Circuit of Appeals

Motion for stay of mandate

Filed December 5, 1929

On this fifth day of December comes Harry L. Thomas, assistant United States attorney for the Western District of Missouri, and respectfully suggests to the court that in the above-entitled cause a writ of certiorari is being sought in the Supreme Court on behalf of the appellant and by the authority and direction of the Attorney General; that unless the mandate herein is stayed the appellant will not be able to present his application for certiorari; that under date of December 4, 1929, telegraphic instructions of the Attorney General directed the applicant herein to apply for this order, said telegram being hereto attached.

Wherefore the appellant prays that the mandate herein be stayed for a period of thirty days for the reasons above stated.

HARRY L. THOMAS,
Assistant United States Attorney,
Attorney for Appellant.

Western Union

1929 Dec. 4, p. m. 4.04.
RXKB290 34 Govt.—KANSAS CITY, Mo., *4, 3.59 p.*

HARRY L. THOMAS,
Assistant U. S. Attorney,
Care U. S. Circuit Court of Appeals,
St. Louis, Mo.:

Wire received reading quote If mandate in Crooks versus Harrelson has not been stayed for full period allowed for filing petition for certiorari, secure additional stay immediately. Mitchell, Attorney General. unquote. Handle while there.

VANDEVENTER.

27 [File endorsement omitted.]

In United States Circuit Court of Appeals

Order staying issuance of mandate

December 5, 1929

On consideration of the motion of appellant for a stay of the mandate in this cause, pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record, and brief have been filed and proof by affidavit of notice thereof under paragraph 3 of rule 38 of the Supreme Court be given, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

28 [Clerk's certificate to foregoing transcript omitted in printing.]

29 Supreme Court of the United States

Order allowing certiorari

Filed February 24, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 34687. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 556. Noah Crooks, collector of internal revenue, petitioner, vs. Benjamin Harrelson et al. Petition for writ of certiorari and exhibit thereto. Filed January 3, 1930. File No. 34687.